IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 417

JOE T. CAWTHORN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER JOE T. CAWTHORN

I

By discussing the facts (Resp. Br., 4-11) without any effort to distinguish between the case which the prosecution presented against the petitioner Cawthorn and the case which it presented against the other defendants, the respondent has avoided the embarrassing necessity of explaining what happened to the prosecution's case against the petitioner Cawthorn when Oliveira, its cornerstone, was proved by mathematical demonstration to have perjured himself concerning the occurrence of the two key conferences in the alleged conspiracy (see Cawthorn Pet., 9-13).

By discussing the facts (Resp. Br., 5-8) as if the defendant Noe were guilty of the accusations levelled against him, without any effort to evaluate the effect of his acquittal by the jury, the respondent avails itself of the prejudicial atmosphere which was injected into the case by the inclusion of Mr. Noe as a defendant.

By the time a case reaches this court, all of the confusion, inherent in a conspiracy indictment, about who did what and the prejudice and atmosphere which the jury takes with it into the privacy of its deliberations should be eliminated, and this question should be squarely faced: What has been proven against this petitioner? If that question were fairly met, the answer would be not what the *acquitted* defendant Noe is alleged to have done, not what the petitioner Burton is alleged to have done, and not what the petitioner LaBranche is alleged to have done, but the complete absence of any credible evidence against the petitioner Cawthorn.

II

We do not find even an attempt on the part of the respondent to discuss the setting and the atmosphere in which this case was tried (see Cawthorn Pet., 7-9, 21) and the effect of the rulings of the Court on the jury in that atmosphere. We find no recognition that this was an extreme case, that the use of the *Allen* instructions, whatever justification therefor might exist in other cases, was coercive and prejudical in a situation where the freedom of the jurors to consider the evidence and decide the guilt or innocence of the defendants on the merits was restricted by the very nature of the issues under consideration.

III

An examination of the eleven pages devoted by the respondent to its attempt to justify the Trial Court's unjustifiable limitation of the cross-examination of the juror Adams, demonstrates the importance of the issues raised by the petition.

The question of whether or not a respected citizen and prominent lawyer shall be deprived of his liberty in a manner "contrary to common fairness as understood by every standard of American justice and due process of law" (2277) will not turn, we are certain, on such subtle arguments as are advanced in the respondent's brief.

For example, the respondent's argument in support of the Trial Court's ruling which limited cross-examination of the juror Adams is introduced with the contention that at the trial "the point at issue * * * was the propriety or impropriety of the question * * * as a cross-examination device for exploring the matter of the witness Adams' *memory and credibility* * * *" (Resp. Br., 13; Resp. italics). At another point in its highly technical argument in support of the Trial Court's ruling the respondent argues that "* * * the sole articulated point of dispute between defense counsel and the trial judge during the colloquy concerning the propriety of the controverted question sought to be asked Adams was the legitimacy of that line of questioning as a means of testing Adams' *memory and credibility* in respect of his direct testimony that the juror LaBranche had voted for acquittal throughout the jury's deliberations" (Resp. Br., 15; Resp. italics). Thereupon, in an astonishing footnote, respondent proceeds to prove that this was *not* the "sole articulated point of dispute between defense counsel and the trial judge", by pointing out very clearly

(Resp. Br., 15, footnote 4) that defense counsel stated (552): "* * * it would be most unfair to have it appear here now that LaBranche was the only one that voted that way" [without good reason and without good cause]. The bracketed words are omitted from respondent's brief but appear in the record as part of counsel's remarks.

The respondent contends in this footnote that "Whatever merit this point might have had, however, it was articulated at no other time during the colloquy, and it is manifest from a reading of the colloquy as a whole that it was never brought home to the trial judge as possibly a sound basis for the admissibility of the controverted line of questioning, distinct from its asserted relevancy as a test of the witness' memory and credibility."

Aside from the absurdity of respondent's suggestion that once a point is made by counsel, it must be "articulated" again, and perhaps, again in order to preserve the defendants' rights, it is completely beyond our power of comprehension to understand how anyone can claim that it is "manifest from a reading of the colloquy as a whole" that the experienced trial judge who presided at the trial of these defendants never had it brought home to him that the basis of defendants' proposed cross-examination of the witness Adams was to prove that LaBranche was not the only juror who voted for acquittal.

Counsel for the defendants at the outset of the colloquy (546) presented for the consideration of the Court the case of *Clark* v. *United States,* 289 U. S. 1. That case had nothing to do with the question of testing the memory of a witness by cross-examination. That case was discussed by counsel and by the Court as a case concerning the privilege of secrecy surrounding jurors' deliberations and the rule that no juror can impeach his verdict (546). In response to a question by the Court,

as to the effect of Mr. Justice Cardozo's opinion, counsel for the defendants stated:

> "He said in there that they could open the doors wide and throw whatever light was necessary that the jury trying the case should find out." (547).

Can it be argued now that the trial judge was not apprised, by this contention, that the defendants were trying to prove what went on in the Burton jury room in order to throw "whatever light was necessary that the jury trying the case should find out"?

The argument of defendants' counsel at the trial (547) then proceeded to a discussion of the case of *State* v. *Serpas,* 188 La. 1074, which had arisen in the State Court in the very jurisdiction where the trial below was held. That case too involved no question concerning the cross-examination of a witness to test his memory or credibility. In connection with the *Serpas* case also, counsel for the defendants in their argument before Judge Borah advocated the principle that "* * * the doors should be thrown wide open" (547). As a matter of fact counsel for the defendants (547-8) summarized his argument as follows:

> "Now, in this case, the Government has opened the doors, and I think it is important to show just exactly what happened, in full, in the jury room, and that is the way I read that case * * *."

Was this an argument that the defendants should be permitted to test the "memory and credibility" of the witness Adams? Does this colloquy indicate a failure on the part of the defendants' counsel to "articulate" his point of view?

The real reason why the argument shifted from the issues presented in the *Clark* and *Serpas* cases appears in the record but not in respondent's brief, for, at the conclusion of the argument of counsel for the defendants the prosecutor addressed the Trial Court (548-9) and asserted:

> "Now, you take the *Clark* case. That *Clark* case—I will cite some language to Your Honor. As I see it, you have two points. One is the question of privilege. *And I think, under the Clark case, it is very clear that in a situation such as this, the privilege is out the window.* But you do have a question of relevancy; and I think it is absolutely irrelevant for the defense to try to bring in what the other jurors did." (Italics ours.)

It was at this point, after the prosecutor had conceded that the "privilege is out the window", that counsel for the defendants for the first time, considering themselves beyond the issues raised in the *Clark* and *Serpas* cases, addressed themselves to the question of testing the witness' credibility and memory.

If there were any doubt at all concerning the issues raised before the Trial Court on this point, it must be dispelled by the opinion of the Court of Appeals (2196-7), which states:

> "On objection the court ruled that, *because of the juror's privilege*, it would be improper to ask how other particular jurors voted * * *. The juror's privilege and the exception when a juror is himself on trial for misconduct in connection with his service, were considered in *Clark*

v. *United States,* 289 U. S. 1. The ruling above recited was in accord with the *Clark* case." (Italics ours.)

Thus, what seems "manifest from a reading of the colloquy as a whole" to the respondent (Resp. Br., 15, footnote 4) is the direct contrary of what was perfectly "manifest from a reading of the colloquy as a whole" to the Court of Appeals. The respondent reads the entire colloquy and finds it relates solely to the question of testing Adams' memory and credibility. The Court of Appeals reads the very same colloquy and finds what is really there, namely, that the issue was the juror's privilege and the right of the Government to call a juror as a witness to testify to so much of what went on in the jury room as appears helpful to itself, and then cut off further inquiry, designed to show the whole picture, because such testimony is helpful to the defendants.

The present position of the respondent is ironical indeed when we consider the final colloquy (556) between Court and counsel after the witness Adams was excused from the stand:

> "Mr. Byrnes: I understand it is not necessary to reverse [reserve] a bill.
>
> The Court: Counsel is correct. As long as your position is known, the court feels you are protected under the rules."

IV

If anything is apparent from the respondent's brief, it is the fact that it is permeated with a desire to create a fetish out of the jurors' privilege, which this Court refused to do in the *Clark* case (289 U. S. 1) a refusal which ~~when~~ the prosecutor who tried the case clearly recognized when he threw the privilege "out the window" (549).

Mr. Justice Cardozo announced for this Court in the *Clark* case (at pp. 13-14):

> "But the recognition of a privilege does not mean that it is without conditions or exceptions * * *. Other exceptions may have to be made in other situations not brought before us now. It is sufficient to mark the one that is decisive of the case at hand."

Nothing could establish more effectively the fact that the petition in this case presents questions of importance in the administration of crimnal law in the federal courts, and a constitutional question concerning the limitation placed by the Trial Court upon the cross-examination of a witness produced by the prosecutor on the most vital issue in the case, than the following excerpt from the respondent's brief (p. 19):

> "Thus, the *Clark* case is square authority for the propriety of the Government's evidence in this case that the juror LaBranche held out for Burton's acquittal throughout the jury's deliberations, and, indeed, it was because of defense counsel's awareness of the *Clark* holding that

no objection was made at the instant trial to that evidence (see R. 546). But it is not authority, as petitioners and the dissenting judge below suppose (see R. 2276), for the further proposition that the defense was entitled to show, on cross-examination of the witness Adams, that jurors *other than LaBranche* also held out for Burton's acquittal." (Resp. italics.)

We cannot believe that such an unconscionable principle will find favor with this Court.

Respectfully submitted,

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